PEDRO BAY CORP.

IBLA 83-805 Decided January 5, 1984

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application A-067524.

Set aside and remanded for initiation of contest proceeding.

1. Alaska: Native Allotments

Under sec. 905 of the Alaska National Interest Lands Conservation Act, a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. The Bureau of Land Management properly allows amendment of a description based on an old protraction diagram of the unsurveyed township, where necessary to locate the allotment on the same land based on a later plat of the surveyed township showing a change in the location of the area platted.

2. Alaska: Native Allotments

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation asserts that the land was in general use by the Native community, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

3. Alaska: Native Allotments -- Alaska: Possessory Rights
The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the

> filing of an application therefor. Where a Native files an application that BLM rejects before completion of the 5-year period, the Native has not acquired a vested right and maintains subsequent right to the land only by continuing possession of the land sufficient to put others on notice of his claim. If the Native does so, upon later reinstatement of the rejected application he or she will acquire a vested right to the application.

APPEARANCES: James D. Grandjean, Esq., Anchorage, Alaska, for Pedro Bay Corporation; G. Blair McCune, Esq., Bethel, Alaska, for Willis Roehl.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Pedro Bay Corporation has appealed the decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 8, 1983, approving the Native allotment application of Willis Roehl, A-067524. On November 9, 1982, appellant filed a protest of the application with BLM pursuant to section 905(a)(5)(A) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(A) (Supp. IV 1980), asserting that Roehl was not entitled to the land described in the application and that the land was withdrawn for selection by appellant under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. IV 1980). BLM's decision approving the allotment states that the protest was considered in adjudicating the allotment application.

The Bureau of Indian Affairs (BIA) filed Native allotment application A-067524 with BLM on behalf of Roehl in March 1966. The application claimed use and occupancy beginning May 1, 1964, of approximately 5 acres in sec. 33, T. 4 S., R. 28 W., Seward meridian, described as follows:

> Beginning at a point approximately 1,050 feet Easterly of Corner No. 1 of U.S.S. 2302, said point being designated as Corner No. 1 of subject tract; thence approximately 330 feet Northerly to Corner No. 2; thence 660 feet Easterly to Corner No. 3; thence approximately 330 feet Southerly to Corner No. 4; thence 660 feet Westerly along the northerly shore of Lake Iliamna to the place of beginning. Land located on the north shore of Pedro Bay on Lake Iliamna.

BIA certified that Roehl is a Native entitled to an allotment on March 29, 1966, but failed to certify that Roehl had occupied and posted the identified lands and that the allotment did not conflict with other Native claims or areas of Native community use and thus BLM rejected the application by decision dated February 7, 1967, pursuant to 43 CFR 2212.9-3(d) (1966).

In September 1979 BLM determined that Roehl should be given an opportunity to show evidence of use and occupancy and reinstated his application pending further determination.

By Interim Conveyance No. 359, dated August 8, 1980, BLM conveyed sec. 33, T. 4 S., R. 28 W., Seward meridian, exclusive of certain portions including Native allotment A-067524, to the Pedro Bay Corporation. Because

BLM's status plats at the time of the conveyance placed the Roehl allotment farther north than the amended description reflects, appellant constructed a community building on land now encompassed by the allotment under the amended description. See Field Report at 3-4.

On June 8, 1982, BIA submitted to BLM an affidavit executed by Roehl in which he states that the legal description of his allotment is incorrect and that the land that he intended to apply for, that he had staked, and on which he had his cabin was outlined on an enclosed aerial photograph of Pedro Bay. Roehl wanted to amend his application to correct the land description pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (Supp. IV 1980).

By letter dated June 18, 1982, BLM allowed Roehl 60 days from receipt to submit proof of 5 years' use and occupancy of the allotment beginning May 1, 1964. He submitted one witness statement to BLM through BIA on August 12, 1982, and an amended legal description. That description reads:

> Commencing at the southeast corner of Section 33, Township 4 South, Range 28 West, Seward Meridian, Alaska, thence run west to a point on the south line of said Section 33 and the easterly bank of Pedro Bay Illiamna Lake, thence run northerly along the easterly bank of Pedro Bay a distance of 1725 feet, more or less, to a point on the easterly bank of said Pedro Bay and the southerly bank of an unnamed stream, said point being the Point of Begining. Thence run east a distance of 660 feet to a point, thence run south a distance of 330 feet to a point, thence run west a distance of 660 feet, more or less, to a point on the easterly bank of said Pedro Bay, thence run northerly along the easterly bank of said Pedro Bay a distance of 330 feet, more or less, to the Point of Begining.

A BLM examiner accompanied by Roehl performed a field examination of the allotment on August 19, 1982. Based on the evidence presented during the field examination, the examiner concluded that Roehl had met the requirements of 43 CFR 2561, finding generally that the potential for Native use of the land exists, that Roehl was familiar with the land, and that he had constructed improvements.

In its statement of reasons, appellant argues initially that BLM approved amendment of the allotment description without giving it notice or following the other procedures required by section 905(c) of ANILCA. Appellant contends that the field examiner recommended approval of the Roehl application without interviewing anyone in the Pedro Bay community and without investigating Roehl's "habits or actions" after 1969. It urges that Roehl's seasonal use of the area, if it did occur, was an element of the general or communal use of the area and thus not exclusive to Roehl. Appellant suggests that its community hall, built before Roehl amended his description, is evidence of the communal use of the area which should have been investigated. Appellant also argues that Roehl abandoned the allotment because he apparently has not used or needed the land since 1969.

Appellant concludes that, at the least, the factual record does not support BLM's conclusion and the case should be remanded for a hearing.

Appellant urges, however, that the application be rejected as a matter of law because the land originally sought was not contiguous to Iliamna Lake or the land included under the amended description, and therefore constitutes an impermissible new application.

In response Roehl argues first that the appeal should be dismissed either because appellant did not file its statement of reasons timely or because appellant has not established its standing to appeal. In addition Roehl contends that appellant's proper recourse in this matter was to initiate a private contest under 43 CFR 4.450 as provided in the BLM decision. These procedural challenges to this appeal are without merit.

Appellant's counsel filed a request for a second extension of time to file a statement of reasons because of a fire in his office building. Although the request identified September 27, 1983, as the desired due date, this Board's order granting the extension of time established September 30, 1983, as the deadline. The statement of reasons was transmitted on September 30 and received by the Board on October 3, 1983, and therefore was timely under 43 CFR 4.401(a). 1/

Roehl urges that appellant is required to establish its standing to appeal either by filing a statement of standing as provided in 43 CFR 4.412(b) or by alleging specifically that it was adversely affected by BLM's decision. However, the requirement of filing a statement of standing applies only to appeals relating to land selections under ANCSA brought under 43 CFR 4.410(b). As this case is not a challenge to such a land selection but rather to approval of a Native allotment application under the Act of May 17, 1906, 43 U.S.C. § 270-1 through 270-3 (1970), the appeal falls within the standing requirement of 43 CFR 4.410(a) that a party to a case be adversely affected by the BLM decision. There is no regulatory requirement that a party file "a statement of standing" asserting the basis for its standing to appeal under 43 CFR 4.410(a). Appellant is a party to this case because its protest was, in effect, denied by the BLM decision approving the allotment. Such a denial, however, does not necessarily establish that an individual is adversely affected. See Elaine Mikels, 41 IBLA 305, 307 n.1 (1979); United States v. United States Pumice Corp., 37 IBLA 153, 158-59 (1977). An unsuccessful protestant must show that a legally recognizable "interest" has been adversely affected by denial of the protest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). Appellant has shown such interest by alleging that the allotment has been approved for lands to which appellant believes it, not Roehl, is entitled under the interim conveyance. The record reflects as well that the community building now within the boundaries of the Roehl allotment was built by appellant.

1/ Appellant's request for an extension of time reflects that a copy of the request was sent to Roehl. Similarly, a copy of the Board's Sept. 2, 1983, order was sent to him. Both documents were mailed to P.O. Box 784 in Bethel, Alaska, Roehl's address of record with BLM, as his counsel had not yet appeared in this appeal.

Although Roehl indicates that he filed a statement in opposition to further requests for time extension, the Board has no record of receiving that document.

The right of appeal to this Board is not granted or taken away by what may be stated in a BLM decision. Texas Oil and Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981). By referring to initiation of a private contest, BLM at most reminded appellant that it has a choice of remedies to pursue. 2/ Initiation of a private contest would have brought disputed issues directly to hearing. By appealing to this Board, appellant must present its case on the facts and law. The Board will direct a hearing or Government contest only where it finds that there are disputed issues of fact dispositive of the legal questions raised or, in the case of an allotment application, that the procedures mandated by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), are required. 3/

To the merits of the appeal, Roehl responds that the original description of his allotment in his application gave notice that the allotment was along the shore of Iliamna Lake despite its apparent mislocation on BLM's status plat. He urges that appellant did receive actual notice of the description amendment and that BLM gave full legal effect to appellant's protest under 43 U.S.C. § 1634 (Supp. IV 1980). Finally Roehl claims that he has shown 5 years continuous use and occupancy, there was no communal use of the land, and he did not abandon the allotment.

Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (Supp. IV 1980), provides that "[a]n allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed," and that the allotment will then be approved or adjudicated as the case may be under section 905 based on the new description. The provision also directs the Secretary of the Interior to notify the State of Alaska and other interested parties of the intended correction of the allotment's location giving them an opportunity to protest the allotment as if the protest were made under section 905(a)(5). Appellant complains that BLM did not notify it of the corrected description for the Roehl allotment even though the land involved had been included in the interim conveyance to appellant. Appellant argues that BLM's failure should not be excused simply because appellant filed a protest anyway. Roehl responds that section 905(c) does not specify any time limits for notification and simply because appellant had not been notified by the time it filed its protest does not mean that BLM would not have so notified it before the allotment was approved.

2/ We would undoubtedly have to find that a protestant or party such as appellant had 30 days to initiate a contest or appeal during which time the effect of the BLM letter decision was stayed and that the initiation of either action would continue to stay the decision. BLM's format is confusing at best and we would recommend that a more precise procedure recognizing the rights of the respective parties be adopted. See, e.g., State of Alaska, 41 IBLA 309 (1979).

3/ See Donald Peters, 26 IBLA 235, 83 I.D. 308, reaff'd on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), approved, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Regardless of what procedures BLM should have been following on this case, appellant has not been harmed by BLM's failure to initiate notification procedures more promptly. We note that the effect of a protest under section 905 is to deny legislative approval of an allotment application and require adjudication under the 1906 Act. Our review of the record reveals that BLM was adjudicating Roehl's application prior to appellant's protest, perhaps in recognition of the conflict subsequently raised by appellant.

[1] The question of whether the amended description is properly accepted turns on whether that description "describes the land originally intended to be claimed." Roehl argues that, contrary to appellant's assertion, the land originally applied for was contiguous to Iliamna Lake as the original description expressly places the allotment on the north shore of the lake and suggests that appellant has been misled by BLM's status plat which mislocated the allotment.

Close examination of the maps and status plats in the allotment application file reveals the origin of the description problem. The BLM field examiner noted that "[t]he original application does not conform to the topography of Pedro Bay." Field Report at 1. Roehl's original application was accompanied by a map that shows the shoreline of Pedro Bay in secs. 32 and 33, T. 4 S., R. 28 W., Seward meridian, as it is shown on a BLM protraction diagram status plat in the file which has a date stamp of April 12, 1966. The allotment was originally described in relation to U.S. Survey 2302 and was diagramed on the shoreline on Roehl's map and this plat. The more recent plats contained in the file, both before and after the 1980 township survey, show the shoreline to be considerably different than it was shown on the earlier plat. When BLM diagramed the reinstated allotment on the later plats based on the original description, it did not place the allotment along the shoreline; rather it plotted it solely in relation to U.S. Survey 2302, apparently ignoring the shoreline description, and did nothing to resolve the conflict inherent in the description. It is interesting to note that if we substitute a shift in direction into the original description, the allotment under that description would be plotted in approximately the same location as the field examiner placed it under the amended description. 4/

Accordingly, we find that the amended description does describe the land that Roehl originally intended to claim and does not constitute a new application.

We now turn to the question of whether Roehl has met the use and occupancy requirements for grant of an allotment and appellant's charges that Roehl's use was part of the communal use of the area and that Roehl abandoned the allotment.

4/ The description would read, "Beginning at a point 1,050 feet [southeasterly] of Corner No. 1 of U.S.S. 2302, said point being designated as Corner No. 1 of subject tract; thence approximately 330 feet [northeasterly] to corner No. 2; thence 660 feet [southeasterly] to Corner No. 3; thence approximately 330 feet [southwesterly] to Corner No. 4; thence 660 feet [northwesterly] along the [northeasterly] shore of Lake Iliamna to the place of beginning.

The evidence of Roehl's use and occupancy in the record shows the following. Roehl's allotment application indicated that Roehl had occupied the land as head of his family since May 1, 1964. As he had not occupied the land for 5 years he did not file evidence of use and occupancy with the application. BLM rejected the application on February 7, 1967, because BIA had not certified that Roehl had occupied and posted the lands in the proper manner or that the allotment did not conflict with other Native claims or areas of Native community use. Following notice of reinstatement of his application and of the need to file evidence of use and occupancy, Roehl filed two documents: (1) his affidavit, dated May 24, 1982, requesting amendment of the allotment description and referring to the land that he had staked and had his cabin on, and (2) the witness statement of Hans A. Roehl, Sr., dated August 2, 1982. 5/ That statement indicates that Roehl began using the land in 1964 or 1965 6/ and that witness Roehl did not know of any years when the applicant did not use the land. It reflects that Roehl used the allotment year-round as a homesite and for wood gathering and cutting, and seasonally for fishing, hunting, trapping and berry-picking, but does not indicate in what years or for how long these activities were pursued. It reports that there was a house or cabin on the land and that there is an outhouse, a dock or boat landing, and a cleared area. In answer to the question whether the land is being used by anyone else and how, the witness answered, "Pedro Bay village I guess" and "put up a building and a dock." He reports that Pedro Bay recognizes that the land is Roehl's allotment and that it uses the land without Roehl's permission.

BLM's field report finds that Roehl began use of the allotment on May 1, 1964, as head of a family and describes that use as follows:

> History of land use by the applicant (dates, types of use, circumstances, etc.): Moved on land in 1964 and built a cabin. Activities on the land included berrypicking, timber cutting, and fishing. The applicant claimed to have lived on the parcel 1964-1969. From 1969-1971 he lived in Iliamna while his mother, brother, and sister stayed in the cabin on the parcel. While in Pedro Bay he lived on the parcel year round except during fishing season.
>
> Are there any conflicts to applicant's exclusive use of land (explain): None known during the period claimed for residency, 1964-1969. There is a trail, now a dirt road, through the parcel. The trail predates occupancy.

(Field Report at 2). The examiner identified an old cabin site, the remains of an outhouse, old stumps, and a dam evidencing use of the land. He noted that there were berry bushes and fishing opportunities. He states that Roehl was familiar with the site and that Roehl showed him the old dam used to impound drinking water. He found that a dirt road parallels the lake shore through the allotment and that a trail on the same route predated the allotment application according to residents of Pedro Bay. The examiner stated that

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5/ Although Hans Roehl presumably signed the statement, the signature was neither notarized nor witnessed by two other persons as provided on the form.

6/ On the witness form, the numeral 4 has been written over the numeral 5 or vice versa. It is impossible to determine which year was intended.

Roehl posted no trespassing signs prior to the field examination but after appellant's community building was constructed. The building falls within the north boundary of the parcel. See Field Report at 2, 3, 4.

[2, 3] The Native Allotment Act provided that "no allotment shall be made to any person * * * until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). Departmental regulation 43 CFR 2561.0-5(a) defines the phrase "substantially continuous use and occupancy" as follows:

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

Potential exclusivity, or independent use, with the sole exception of a head of a household who used the land with his or her family, is key to an allotment grant. See Andrew Petla, 43 IBLA 186, 198-201 (1979) (Judge Burski concurring).

This Board has also found that the right to a Native allotment vests upon the completion of 5 years' use or occupancy of the land and the filing of an application for the allotment. Absent timely filing of an application, where a Native has completed the requisite 5 years' use and then ceases to use or occupy the land and permits it to return to an unoccupied state, the right to an allotment of that land terminates regardless of the subjective intent of the Native. United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). Once an application has been filed, however, the allotment can be abandoned only under traditional common law principles which require an intent to abandon. Id. at 234-35.

The record as it now exists establishes, we believe, that Roehl and his family did build a cabin and live on the land at issue for some period of time. The 1967 BLM rejection of Roehl's application upon BIA's failure to make the previously-noted certifications, however, raises the question whether Roehl's use comported with the requirements of the Native Allotment Act and the regulations up to that time. Roehl did not appeal BLM's decision and therefore it was final Departmental action. There is no evidence in the record that the lands were posted at that time or that the community was excluded from the area. Although the field examiner found no known conflict's with Roehl's exclusive use of the land during 1964-1969, the evidence of a pre-existing trail through the allotment was not explained. Its existence suggests that Roehl's use was not necessarily "potentially exclusive." BLM's reinstatement of the Roehl application in 1979 only recognizes that Roehl should have perhaps been given an opportunity to prove his use and occupancy rather than having the application rejected based on BIA's failure to act. It makes no statement as to the sufficiency of his use or validity of the application.

Roehl contends that he has a vested right to the allotment because he completed 5 years' use and occupancy and he filed an allotment application.

We disagree. In United States v. Flynn, supra, we did find that a vested right arises from the fulfillment of those two conditions. In this case, however, the earliest that Roehl's right could have vested was upon reinstatement of the application by BLM in 1979. When he originally filed the application in 1966 he had not completed the required use and occupancy. When he allegedly completed the use and occupancy in 1969, he had no outstanding application because it was rejected finally in 1967. After the 1967 rejection, as discussed in Flynn, Roehl had only a right of possession based on continuing use and occupancy. Cessation of his use and occupancy for a period of time sufficient to remove evidence of a present use, occupancy or claim to the land would have terminated his right to the land under the Native Allotment Act and restored the land to its original status of vacant and unappropriated land open to the initiation of rights by others. We note that T. 4 S., R. 28 W., Seward meridian, has been continuously withdrawn from entry since December 18, 1971, for the purpose of village selection under the ANCSA and succeeding public land orders. 7/ The record does not show when appellant began using the land or when the community building was constructed.

Thus, similar to the circumstances in the Flynn case, for Roehl's right to this allotment to have vested in 1979 he must have completed 5 years' sufficient use and occupancy and maintained possession of the land sufficient to have put others on notice of his claim, thereby barring initiation of any conflicting rights. The fact that the community building was constructed would seem to belie that conclusion here. Appellant claimed to rely on the mislocation of the allotment on BLM's plats. We add that presumably from sometime after the application's 1967 rejection until sometime after the 1979 reinstatement, the plats did not give notice of the allotment in any location.

In view of the foregoing we have no alternative but to direct that BLM initiate contest proceedings against the allotment application as required by Pence v. Kleppe, supra. See note 3 supra. A copy of the contest complaint shall be served on appellant which, upon the filing of a proper motion, shall be allowed to intervene. See State of Alaska, 28 IBLA 83, 89-90 (1976). The hearing at a minimum should focus on the exact nature and duration of Roehl's use of the land and of appellant's or the community's use of the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is set aside and the case remanded for initiation of a contest proceeding.

Will A. Irwin
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

7/ Public Land Order No. (PLO) 5184, dated Mar. 9, 1972 (37 FR 5587 (Mar. 16, 1972)); PLO 5654, dated Dec. 15, 1978 (43 FR 59757 (Dec. 21, 1978)).